IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 1:07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

UNITED STATES' OPPOSITION TO "MOTION BY DEFENDANT SMITH FOR DISCLOSURE OF GRAND JURY COLLOQUY AND TESTIMONY PURSUANT TO RULE 6(e)(3)(E)(i) AND RULE 6(e)(3)(E)(ii) BASED UPON THE STATE OF THE DISCOVERY" (DOCKET # 84), AND REQUEST FOR AN ORDER EXCLUDING IMPROPER EVIDENCE AT TRIAL RELATING TO THE SCOPE OF THE UNITED STATES' INVESTIGATION OF OTHER MATTERS

Defendant Jon Paul Smith ("Smith") has filed a Motion (Docket # 84) requesting that the Court order the United States to disclose grand jury colloquy and testimony pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(i) and 6(e)(3)(E)(ii).[1] Defendant Smith asserts that he

[1] Defendant B&H Maintenance & Construction, Inc. ("B&H") (B&H Mot. for Leave to Join (Docket # 86)), and Defendant Martin (Landon Martin's Mot. for Leave to Join (Docket # 87)) have moved to join this Motion by Defendant Smith for grand jury colloquy and testimony. Should the Court grant those Motions to join, this response would also apply to those Motions.

needs the colloquy and testimony to prepare for trial, and to ascertain "if there is a basis for a motion to dismiss the indictment based upon the failure of the Government to accurately present evidence as to the conduct of Flint Energy and Kenneth Rains." (Defendant's Motion at ¶ 7.) Smith further claims that the materials will provide evidence for the impeachment of Government witnesses and "an attack upon the investigation conducted by the Government." *Id.*

Defendant's Motion for grand jury testimony and colloquy should be denied. First, Defendant's claimed need for grand jury testimony and colloquy does not meet the particularized need standard set forth in Rule 6(e)(3)(E)(i). Second, as to Defendant's Rule 6(e)(3)(E)(ii) request, the Indictment is valid on its face and Defendant has not alleged anything that would be a sufficient ground to dismiss it.

Furthermore, Defendant Smith claims he needs the grand jury testimony and colloquy in order to attack the investigation conducted by the United States. The scope of the United States' investigation into *other* matters is not relevant under Federal Rule of Evidence 401, and not admissible under Federal Rule of Evidence 402. Therefore, the United States hereby requests the Court to order the Defendants not to elicit any testimony or make any statements in opening or closing argument about the scope of the United States' investigation into matters separate and apart from the bid rigging charged in this Indictment.

I. Defendant Smith has Made no Showing of Particularized Need for Grand Jury Transcripts and Colloquy

As a basis for his request that the Court order disclosure of grand jury materials pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(i), Defendant Smith asserts that the grand jury

testimony and colloquy will provide evidence with which to impeach the witnesses for the United States at trial.[2] In response to this claim, the United States relies on "United States' Opposition to 'Defendant B&H's Motion for Disclosure of Grand Jury Materials'" (Docket # 58), which sets forth the particularized need standard to be met for disclosures of grand jury matters under Federal Rule of Criminal Procedure 6(e)(3)(E)(i). Defendant Smith's request for disclosure fails to meet this standard.

Additionally, Defendant Smith's claimed need[3] for the grand jury transcript presupposes that the witnesses the United States will call at trial testified before the grand jury. In fact, the evidence that led to the Indictment in this case was presented to the grand jury by a summary witness who is not expected to testify at trial.[4] The work of grand juries is not confined by rigid procedural rules. When the Supreme Court considered the question: "May a defendant be required to stand trial . . . where only hearsay evidence was presented to the grand jury which indicted him?" *Costello v. United States*, 350 U.S. 359, 359 (1956), it answered the question in the affirmative:

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[2] Defendant Smith also refers to Defendant B&H's previously filed motion for disclosure of grand jury transcript and exhibits. (Def. B&H's Motion for Discl. of Grand Jury Mat'ls (Docket # 44)) In that Motion, B&H baldly asserts that the grand jury transcript and exhibits are necessary to prepare its defense. In its Reply in Support of its Motion for Disclosure of Grand Jury Materials (Docket # 64), Defendant B&H expands on its claim by saying it needs the transcripts and exhibits in order to "impeach, refresh the recollection of, and test the credibility of the prosecution's witnesses at trial." (B&H Reply, ¶ 2, p. 2.)

[3] And Defendant B&H's claimed need as well.

[4] Should that witness be called to testify at trial, the United States will produce the transcript of his testimony to the Defendants pursuant to the Jencks Act, 18 U.S.C. § 3500.

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. . . . This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

Id. at 363.

Defendant Smith also asserts that the grand jury transcript and colloquy will support "an attack on the investigation conducted by the Government." (Defendant's Motion at ¶ 7.) Nowhere does he explain how such an attack would be relevant to whether Defendant Smith committed the crimes with which he is charged and, thus, admissible in the trial of this case. Evidence which is irrelevant, is inadmissible. *See Federal Rules of Evidence 401 and 402.* Particularized need for grand jury transcripts and colloquy cannot be shown by a claim that the defendant wants to search for evidence which would be inadmissible at trial because it is irrelevant to his guilt or innocence on the charges pending against him.

No showing of particularized need has been made, and thus Defendant Smith's Motion for disclosure pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(i) should be denied.

II. The Defendant has Not Shown that Any Gounds Exist to Dismiss the Indictment Because of Matters Occuring Before the Grand Jury

A. There is no Requirement that Exclupatory Evidence be Presented to the Grand Jury

In support of his Motion for grand jury transcript and colloquy pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(ii), Defendant Smith claims that there is evidence in the discovery suggesting that the United States did not present evidence to the grand jury as to the

"large scale corruption" by Flint Energy Services, Inc. ("Flint") and Kenneth Rains that would have gone directly to their credibility[5] (Defendant's Motion at ¶ 2). Evidence going to the credibility of a witness is a form of exculpatory evidence. *See United States v. Buchanan*, 891 F.2d 1436, 1443 (10th Cir. 1989) ("because impeachment is integral to a defendant's constitutional right to cross-examination, there exists no pat distinction between impeachment and exculpatory evidence . . . ").

In *United States v. Williams*, 504 U.S. 36 (1992), the Supreme Court examined whether an otherwise valid indictment should be dismissed because the Government did not disclose "substantial exculpatory evidence" to the grand jury. *Id.* at 38. Holding that there is no requirement for the prosecutor to disclose exculpatory evidence to the grand jury, the Court significantly narrowed the grounds available for defendants to obtain access to grand jury testimony and colloquy:

> . . . requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body.
>
> It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge.

Id. at 51. *See also Bank of Nova Scotia v. United States*, 487 U.S. 250, 261 (1988) ("the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment"); *Costello*, 350 U.S. at 364 ("Defendants are not entitled . . . to a rule which would result in interminable delay but add nothing to the assurance of a fair trial.")

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[5] The "credibility" of Flint, a corporation, is not relevant to the guilt or innocence of the defendants in this case.

Therefore, Defendant Smith's for grand jury transcript and colloquy pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(ii) should be denied.

B. The Documents Cited by Defendant are not Exculpatory

In support of his Motion for grand jury transcript and colloquy under Federal Rule of Criminal Procedure 6(e)(3)(E)(ii), Defendant Smith points to two documents produced by the United States to the Defendants in discovery.[6] The first document, number BP-DOJ-0027383,[7] is a document that was produced by BP America Production Company ("BP America") which shows that Jeff Kramme left his employment with MBF, a contractor that worked on many BP America projects, in **May of 2005** for "career opportunities." The career opportunity was his job with Flint. Shortly after Kramme started working for Flint he became aware of the bid rigging conspiracy between Flint, Kenneth Rains and the three defendants in this case. In December 2005, he reported the conspiracy to BP America.

The second document, BP-DOJ-0027370 - 0027371, an e-mail from Kramme to BP America executives Chad Tidwell and John Mummery, begins by saying, "On December 14, 2005, I understood that BP's security division would be investigating my allegations of collusion, reported to BP on December 8, 2005." The collusion that Kramme reported to BP America is detailed in a three page memo that Mummery wrote at the request of Chad Tidwell on December

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[6] He attaches a third document as Exhibit One to his Motion.

[7] In referring to the documents the Defendant omitted the two initial zeros (00) in the Bates number.

9, 2005, the day after Kramme came to him with allegations of collusion. (BP-DOJ-0000372 - 0000374) Among the things that Mummery recounts Kramme telling him are the following:

> He said that since he had worked at Flint from earlier this year he had suspected and then seen bid collusion on the part of Kenny Rains and JP Smith with B&H Maintenance and Pipeline.
>
> * * *
>
> . . . he began to witness Kenny either talking to JP on the phone or notes about B&H's bid prices in files.
>
> * * *
>
> He pointed to a handwritten number of $148,953 which he said was in Kenny's handwriting if I looked it up would be the bid that B&H placed on the project.

When Mummery was able to check the numbers which had been bid on the project Kramme talked about, he "saw immediately the same bid number of $148,953 for the B&H bid that [he] saw on Jeff's file."

III. Conclusion

For the reasons stated above, and for those stated in "United States' Opposition to 'Defendant B&H's Motion for Disclosure of Grand Jury Materials'" (Docket # 58), Defendant Smith's Motion for grand jury testimony and colloquy should be denied.

Defendant Smith's claimed need for grand jury testimony and colloquy does not meet the particularized need standard set forth in Federal Rule of Criminal Procedure 6(e)(3)(E)(i). Furthermore, the Indictment is valid on its face, and Defendant has not alleged anything that would be a sufficient ground to dismiss it as support for his motion for disclosure under Federal Rule of Criminal Procedure 6(e)(3)(E)(ii).

Additionally, in his Motion, Defendant Smith has said he needs the grand jury testimony and colloquy in order to attack the investigation conducted by the Government. The scope of the United States' investigation into *other* matters is not relevant under Federal Rule of Evidence 401, and not admissible under Federal Rule of Evidence 402. Therefore, the United States requests the Court to order the Defendants not to elicit any testimony or make any statements in opening or closing argument about the scope of the United States' investigation into matters separate and apart from the bid rigging charged in this Indictment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2007, I electronically filed the foregoing "United States' Opposition to 'Motion by Defendant Smith for Disclosure of Grand Jury Colloquy and Testimony Pursuant to Rule 6(e)(3)(E)(i) and Rule 6(e)(3)(E)(ii) Based upon the State of Discovery' (Docket # 84), and Request for an Order Excluding Improper Evidence at Trial Relating to the Scope of the United States' Investigation of Other Matters" with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

gjohnson@hmflaw.com

hhaddon@hmflaw.com

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I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

s/Diane Lotko-Baker

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